Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
AT&T CORP.)
)
and)
)
SBC COMMUNICATIONS INC.) WC Docket No. 05-65
)
Application Pursuant to Section 214)
of the Communications Act of 1934 and)
Section 63.04 of the Commission's Rules)
for Consent to the Transfer of Control of)
AT&T Corp. to SBC Communications Inc.)

COMMENTS

OF

THE AMERICAN ANTITRUST INSTITUTE

Albert A. Foer
President
American Antitrust Institute
2919 Ellicott Street, N.W., Suite 1000
Washington D.C. 20008-1022
(202) 276-6002

Jonathan L. Rubin
Senior Research Fellow
American Antitrust Institute
2919 Ellicott Street, N.W., Suite 1000
Washington D.C. 20008-1022
(202) 415-0616

Counsel for American Antitrust Institute

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Introduction

The American Antitrust Institute ("AAI") submits these Comments in accordance with the Commission's *Public Notice* in the above-captioned proceeding.[1] AAI is an independent research, education, and advocacy organization that supports a leading role for competition, as enforced by our antitrust laws, within the national and international economy. Background on the AAI may be found at www.antitrustinstitute.org, including participation in other matters involving the telecommunications and media industries.[2]

The AAI's sole interest in this proceeding is to ensure that the Commission promotes the public interest, convenience and necessity and enhances consumer welfare by minimizing the potential for competitive distortions in the wireline segment of the national telecommunications markets. The AAI appreciates the opportunity to provide comments on the captioned applications.

FCC's Statutory Duties and the Standard of Review

In this proceeding, the Commission is called upon to review an historic transfer of control application filed by AT&T Corp. ("AT&T") to SBC Communications, Inc. ("SBC," collectively, the "Applicants") for the transfer of licenses and permits controlled by AT&T to SBC. If approved, this transaction, along with a similar proposed transaction in an application for transfer of control filed by Verizon Communications, Inc. ("Verizon") and MCI, Inc. ("MCI"),[3] will reestablish vertical common ownership between a 13-state incumbent LEC and the nation's premier long-distance and network facilities operator (or, in the case of a Verizon-MCI merger, the country's largest incumbent LEC (29 states, plus the District of Columbia) and the second largest long-distance and networking company). Because such co-ownership represents a fundamental shift in U.S. telecommunications regulation, the Commission's actions on these applications are likely to affect the competitive environment in the telecommunications industry for years to come.

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[1] Application of AT&T Corp., Transferor, and SBC Communications, Inc., Transferee, for Consent to the Transfer of Control, WC Docket No. 05-65, *Commission Seeks Comment on Application for Consent to Transfer of Control Filed by SBC Communications, Inc. and AT&T* Corp., *Pleading Cycle Established* (rel. Mar. 11, 2005).

[2] Funding comes to the AAI through contributions from a wide variety of sources. Nearly 90 separate sources each have contributed over $1,000. A full listing is available on request.

[3] Applications of MCI, Inc. Transferor and Verizon Communications Inc.. Transferee, WC Docket No. 05-75, *Application for Transfer of Control* (filed March 11, 2005).

Before it can approve the applications, the Commission is required to determine that the proposed transfer "serves the public interest, convenience, and necessity."[4] This necessitates an affirmative showing by the applicants, who bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.[5]

As the Applicants appropriately point out,[6] the Commission has identified "four overriding questions" when applying the public interest test:

> (1) whether the transaction would result in a violation of the Communications Act or any other applicable statutory provision; (2) whether the transaction would result in a violation of Commission rules; (3) whether the transaction would substantially frustrate or impair the Commission's implementation or enforcement of the Communications Act, or would interfere with the objectives of that and other statutes; and (4) whether the merger promises to yield affirmative public interest benefits.[7]

The Commission's balance of public interest benefits and harms must include an analysis of the potential competitive effects of the proposed transaction, as informed by traditional antitrust principles.[8] In evaluating a merger or acquisition, the Commission must consider the likely effect on future competition. In order to find that a merger is in the public interest, "the Commission must 'be convinced that it will enhance competition.'"[9]

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[4] 47 U.S.C. §310(d)

[5] See, *e.g.*, Applications of AT&T Wireless Services, Inc. Transferor, and Cingular Wireless Corporation Transferee, For Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 04-70, *Memorandum Opinion & Order*, 19 FCC Rcd 21522, ¶40 (2004) ("*AWE/Cingular Order*"), and the authorities cited therein.

[6] Applicants' *Description of the Transaction, Public Interest Showing, and Related Demonstrations* (filed Feb. 21, 2005), at 12 ("*Public Interest Statement*")..

[7] Applications of Ameritech Corp. Transferor, and SBC Communications Inc. Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses, CC Docket No. 98-141, *Memorandum Opinion and Order*, 14 FCC Rcd. 14712 ¶48 (1999)(subsequent history omitted) ("*Ameritech/SBC Order*").

Under the Communications Act, the Commission shares concurrent antitrust jurisdiction with the Department of Justice ("DOJ") under the Clayton Act to review mergers between common carriers.[10] The Commission usually concludes that its public interest authority is sufficient to address the competition issues.[11]

Customarily, the Commission performs its competitive analysis of proposed mergers by hewing closely to the approach set forth in the *DOJ/FTC Horizontal Merger Guidelines.*[12] The *Merger Guidelines* approach product market definition from the perspective of demand substitution factors, *i.e.*, possible consumer responses. Starting with the smallest possible group of competing products, the analysis asks whether a hypothetical monopolist could profitably impose a small but significant and non-transitory increase in price ("SSNIP").[13] Antitrust doctrine has come to regard 5% as a "small but significant" price increase.[14]

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[8] See *Ameritech/SBC Order*, at ¶49, note 121 (1999)("Although the Commission's analysis of competitive effects is informed by antitrust principles and judicial standards of evidence, it is not governed by them, which allows the Commission to arrive at a different assessment of likely competitive benefits or harms than antitrust agencies arrive at based on antitrust law").

[9] *Id*. at ¶49, quoting Applications of Nynex Corp. & Bell Atl. Corp., *Memorandum Opinion and Order*, 12 FCC Rcd. 19985, 19987, ¶ 2 (1997) ("*Nynex/BellAtlantic* Order").

[10] See 15 U.S.C. §18, 21(a); Section 7 of the Clayton Act (15 U.S.C. §18) prohibits a corporation from acquiring "the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

[11] See, *e.g.*, *Ameritech/SBC Order*, at ¶53.

[12] *Horizontal Merger Guidelines*, U.S. Department of Justice and the Federal Trade Commission, (April 2, 1992, as revised April 8, 1997) (hereinafter, "*Merger Guidelines*").

[13] *Id.*, at §1.11

Similarly, for the definition of the geographic antitrust market, if buyers would switch to substitute services outside of the geographic market as initially defined, the market boundaries should be expanded. Otherwise, the subject market may constitute the relevant antitrust market.[15]

Based on its own expertise in the telecommunications industry, the Commission has adapted the *Merger Guidelines* methodology so that it applies more meaningfully to telecommunications mergers. For example, in the *AWE/Cingular* merger the Commission devised a concentration screen based on the Herfindahl-Hirshman Index ("HHI") to identify which out of 348 U.S. Component Economic Areas and 734 Cellular Market Areas represented defined geographical markets in which potential anticompetitive effects were most likely.[16] The markets thus identified were then analyzed for the likelihood of both unilateral and coordinated effects, as the *Merger Guidelines* recommend.[17]

The Commission Cannot Presently Analyze the Competitive Implications of the Transaction or Discharge its Public Interest Duties

In light of the foregoing, considerable analysis is required by the Commission before it can adjudicate the present Application. There are three principal reasons why the Commission is not yet in a position to begin to adjudicate the pending Application. First, the Application is materially deficient. Second, a second merger of a similar magnitude has been proposed between Verizon and MCI, and therefore neither merger can be considered in isolation. Finally, in light of the fact that these proposed mergers would dramatically alter the established regulatory regime, currently pending regulatory proceedings should be resolved in advance of the approval of this type of merger to large-scale vertical integration.

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[14] See *U.S. v. Sungard Data Sys., Inc.*, 172 F.Supp.2d 172, 182 (D. DC, 2001).

[15] *Id*, at §1.21.

[16] See *AWE/Cingular Order*, at ¶104.

[17] A merger challenge based on unilateral effects is usually based on a particular group or class of customers who are likely to be harmed as a consequence of the accretion of market power resulting from the merger, see *Merger Guidelines*, §2.21. The Merger Guidelines define "coordinated interaction" as "actions by a group of firms that are profitable for each of them only as a result of the accommodating reactions of the others." *Id.,* §2.1. That is, the post-merger market may be so concentrated that coordinated interaction would be facilitated by the merger.

The Application is Materially Deficient

The Application and its supporting materials is insufficient to permit a competitive analysis. It is impossible to isolate products with the granularity needed to determine which products are substitutes of which other products.[18] The application is devoid of any geographic market definition for any product line, or any meaningful market share data. Having many times been through numerous mergers and consolidations before this Commission and other federal, state, and foreign competition authorities, Applicants are well aware of the Commission's duties with respect to the competitive analysis that is required, but have chosen not to be forthcoming with even the most rudimentary market data. Instead, Applicants have filed a self-serving and conclusory statement repeatedly expressing their unsupported opinion that no adverse competitive effects could result from the Commission's approval of this transaction.

That no meaningful competitive analysis can be undertaken on the basis of the information provided by the Applicants is clearly evidenced by the letter request of April 18, 2005 requesting the Applicants to furnish items of information that require a list ten pages long.[19] The overwhelming majority of those items relate to market definition, the quantification of customers, and market shares. This information is material and should be considered an amendment to the initial application, with an opportunity for Comments or Petitions to Deny after that additional information has been submitted by the Applicants.[20]

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[18] For example, the Applicants repeatedly point to the ascent of mobile telephony in their description of competitive pressures on their wireline businesses. But a majority of mobile telephony users are residential not enterprise customers. The Applicants make no suitable distinction that would allow identification of the product market with which mobile is supposed to compete; see *AWE/Cingular Order*, ¶79.

Despite the deficiencies in the information provided by the Applicants, it is clear that the proposed merger will have both a horizontal as well as a vertical effect. The horizontal effects will be felt in any market in which the Applicants' facilities overlap and serve a similar class of customer, which is likely to arise in the special access and switched access markets. However, vertical effects must also be considered. In particular, the Commission must satisfy itself that the competitive environment has changed so drastically in the past few years that the incentives for anti-competitive conduct that motivated the quarantine of the incumbent LEC's in the 1984 Modified Final Judgment and the safeguards in the Sections 271 and 272 of the Telecommunications Act of 1996[21] are now so completely absent that the Commission can allow co-ownership of vertically related facilities without imposing even the most fundamental safeguards. Applicants have not met their burden of making such a showing.

In the event of excessive post-merger market concentration or other evidence of market power possessed by the merged entity, the Applicants are ordinarily given an opportunity to justify the transaction by demonstrating merger-specific benefits or efficiencies. The Applicants have similarly failed in this regard. Although the application repeatedly touts expected benefits from the proposed merger, nowhere do the parties explain why these efficiencies—such as the large-scale migration of networks to IP-based, next generation structures, and innovation through research and development—require the merger before they can be realized. In fact, in an environment of modularity and converging networks (the case with IP migration). vertical integration is less advantageous for achieving efficiencies, not more. The Applicants should be required to identify which of the claimed benefits and synergies are merger-specific and should be required to explain why.

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[19] *Letter* from Michelle M. Carey, Deputy Chief, Wireline Competition Bureau to Patrick J. Grant and David L. Lawson, WC Docket 05-65 (Apr. 18, 2005).

[20] See 47 C.F.R. §1.939(e) ("Petitions to deny amended applications. Petitions to deny a major amendment to an application may raise only matters directly related to the major amendment that could not have been raised in connection with the application as originally filed. This paragraph does not apply to petitioners who gain standing because of the major amendment.")

[21] 47 U.S.C. §§271, 272.

Merger Analysis in a Volatile Post-Merger Market

Merger analysis depends on reasonable prediction. A proposed merger can only be analyzed if the post-merger market can be assessed. When multiple large-scale mergers are occurring simultaneously, an additional factor of uncertainty is introduced into the analysis. The only reasonable option for a competition authority in these circumstances is to consolidate the two transactions for analysis in a single proceeding.[22] This allows for the substance of the mergers to control the outcome rather than which application was filed first.

The difficulty of proceeding with an analysis of the present transaction in isolation is easy to appreciate: A post-merger market of two or three vertically integrated competitors similar in size and capacity to the proposed SBC-AT&T involves one level of potential for anti-competitive effects; a post-merger market in which the Applicants are the sole vertically-integrated provider involves another. The present application should be stayed pending a resolution of the negotiations related to the second major vertical integration merger involving MCI, and then consolidated for joint consideration.

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[22] See, *e.g.*, *FTC v. Cardinal Health, Inc., et al.*, 12 F.Supp2d 34 (D.C.D.C, 1998)(finding the FTC entitled to enjoin two simultaneous mergers in the wholesale prescription drug industry in a consolidated proceeding and giving weight to the cumulative effect of the two proposed mergers).

Approval of this Merger will Vitiate Important Ongoing Regulatory Initiatives

Ordinarily, the Applicants should receive a sympathetic hearing for their argument that a merger proceeding is not the appropriate vehicle for the determination of wider issues of regulatory policy.[23] In this case, however, the Commission should not let the private interests of these Applicants dictate the future course of wireline regulation. Proceedings such as the *Pricing Flexibility NPRM*[24] or the *Section 272 Sunsets,*[25] for example, reflect a continuing struggle with incumbent LEC market power and involve a substantial data collection effort. Logic dictates that these proceedings should be permitted to run their course before the vertical-integration mergers can be addressed.

Conclusion

The information and material presented by Applicants are wholly insufficient for the purpose of a meaningful review by the Commission, and the AAI is similarly unable to assess the likely competitive impact of the proposed transaction. We look forward to the opportunity to review the additional information requested from the Applicants and to presenting an analysis of the likely competitive effects of this transaction.

Based on the foregoing, the Commission should not approve any transaction without an appropriate competitive analysis.

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[23] See *Public Interest Statement*, at 103, note 345.

[24] See Special Access Rates for Price Gap Local Exchange Carriers, WC Docket 05-25, *Notice of Proposed Rulemaking* (rel. April 13, 2005).

[25] See Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements, WC Docket 02-112, *Memorandum Opinion and Order* (rel. Dec. 23, 2002).

Respectfully submitted,

AMERICAN ANTITRUST INSTITUTE

Albert A. Foer,
President

Jonathan L. Rubin,
Senior Research Fellow

By: Jonathan Rubin

Jonathan L. Rubin
Counsel for American Antitrust Institute
2919 Ellicott Street, N.W., Suite 1000
Washington D.C. 20008-1022
(202) 415-0616
D.C. Bar No. 353391

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